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FILED/ACCEPTED

August 10, 2012

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

AUG 10 2012

Federal Communications Commission
Office of the Secretary

Re: **REDACTED - FOR PUBLIC INSPECTION**
Project Concord, Inc. v. NBCUniversal Media, LLC (AAA Case No. 72-472-E-01147-11)
MB Docket No. 10-56

Dear Ms. Dortch:

Enclosed are an original and two (2) copies of the Public version of the Opposition to Project Concord, Inc.'s Partial Appeal, submitted on behalf of NBCUniversal Media, LLC ("NBCUniversal") in the above-captioned proceeding.

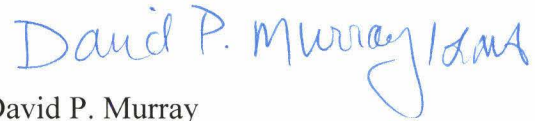
This Public version has been redacted consistent with the procedures directed by Media Bureau staff, and for the reasons detailed in the Request for Confidential Treatment submitted with the Confidential version of the filing on July 31, 2012. NBCUniversal is also today serving a copy of the Public version of the filing via hand delivery to Monica Desai, counsel for Project Concord, Inc.

If you have any questions, please do not hesitate to contact me.

0+2

Marlene H. Dortch
August 10, 2012
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Very truly yours,



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Martha Heller, Deputy Division Chief, Industry Analysis Division, Media Bureau
Monica Desai, Counsel for Project Concord, Inc.
John M. Genga, Counsel for Project Concord, Inc.

Enclosures

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

AUG 10 2012

Federal Communications Commission
Office of the Secretary

In the Matter of Arbitration between)
Project Concord, Inc.,)
Claimant,)
-vs.-)
NBCUniversal Media, LLC,)
Respondent.)
_____)

File No. _____
MB Docket No. 10-56

To: The Commission
Attention: Chief, Media Bureau

OPPOSITION TO PROJECT CONCORD, INC.'S PARTIAL APPEAL

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I. INTRODUCTION

PCI has appealed the Arbitrator's denial of its requests for costs and attorneys' fees.¹ The *Order* only authorizes cost-shifting where a party has acted unreasonably during the arbitration. Despite PCI's labored attempts to portray NBCUniversal's arbitration conduct as "unreasonable," the Arbitrator found that NBCUniversal acted reasonably and in good faith throughout the proceedings. He correctly ruled that PCI's request was legally and factually baseless.

Because NBCUniversal did not engage in any unreasonable conduct, PCI resorts to arguing on appeal that a different standard for awarding costs and fees should be applied whenever a "start-up" OVD like PCI invokes arbitration under the Benchmark Condition. PCI's attempt to rewrite the *Order* is improper. The unreasonableness standard is well-established in American jurisprudence and consistent with prior Commission precedent for final offer arbitration conditions. It is a sanction for misconduct, not a prevailing party provision. PCI cannot change this standard after-the-fact. Nor is there any reason for the Commission to revisit its longstanding policy.

In all events, there is no plausible ground for shifting the costs of this arbitration to NBCUniversal. These proceedings could have been avoided (or substantially narrowed) if PCI had originally offered NBCUniversal [REDACTED] that PCI ultimately offered in its Phase 2 Final Offer (or even [REDACTED]). Having chosen to use the Benchmark Condition in an improper attempt to [REDACTED]

¹ Defined terms have the same meaning as set forth in NBCUniversal's Petition For *De Novo* Review ("NBCUniversal Pct.").

_____ PCI is in no position to complain about its resulting litigation costs.

For these reasons, the Commission should affirm the Arbitrator's denial of PCI's cost-shifting requests in their entirety.

II. NBCUNIVERSAL ACTED REASONABLY AND IN GOOD FAITH DURING THE ARBITRATION.

The *Order* only authorizes an award of costs and fees if “the arbitrator finds that one party’s conduct, during the course of the arbitration, has been unreasonable”² PCI filed two fee petitions (totaling 62 pages) that wrongly depicted virtually every action by NBCUniversal in the arbitration as “unreasonable.”³ The Arbitrator denied both petitions in their entirety, ruling unequivocally that he “[could not] and will not find that any ‘unreasonable conduct’ occurred. Rather . . . this was a complex, hard fought and time-pressured legal proceeding where both sides were represented by skilled and sophisticated counsel, and . . . the attorneys generally acted cooperatively, ethically and professionally with one another.”⁴ The Arbitrator went on to emphasize that, to the extent he did not specifically address “all of the many alleged acts of unreasonable conduct upon which PCI relies, it should suffice to say that [he did] not find *any* part of PCI’s ‘cost-shifting’ request to be convincing.”⁵

Indeed, PCI's assertions in the fee petitions mischaracterize the record and are specious at best. For example, PCI claimed that NBCUniversal acted "unreasonably" in arguing that the

² *Order*, App. A, §§ VII.B.10, VIII.5.

³ Phase 2 Award at 11-12; *see also* MacHarg Decl., MacHarg Sec. Decl.

⁴ Phase 2 Award at 11-12.

⁵ *Id.* at 12 (emphasis added).

Order's definition of "Video Programming" excludes films less than one year from theatrical release.⁶ NBCUniversal based its position on the plain language of the *Order*, which defines "Video Programming" to include, in relevant part, only "[f]ilms for which a year or more has elapsed since their theatrical release."⁷ Although the Arbitrator ultimately disagreed with NBCUniversal, there was nothing unreasonable about NBCUniversal's position that this plain language should be given its proper meaning and effect. This important issue is now before the Commission for *de novo* review.⁸

PCI further contended that NBCUniversal acted "unreasonably" by relying on procedures and defenses expressly authorized under the *Order*. The Arbitrator properly rejected these claims, observing that:

While PCI complains, amongst other things, that NBCU's request that the arbitration be bifurcated . . . and NBCU's submission of a Phase 1 Final Offer on the scope of Comparable Programming rather than a proposed contract for carriage were dilatory acts, and that NBCU had no proper basis for asserting its Contractual Impediment Defense, *these are all matters suggested in the Conditions*.⁹

More specifically, the *Order* provides for "bifurcated" arbitration proceedings (i.e., phases 1 and 2) where there are disputes about the appropriate scope of Comparable Programming and potential threshold defenses that may negate or limit NBCUniversal's obligation to provide content to the OVD pursuant to the Benchmark Condition.¹⁰ PCI *agreed* to

⁶ MacHarg Decl. ¶¶ 85-88.

⁷ *Order*, App. A, § I.

⁸ NBCUniversal Pct. at 10-16.

⁹ Phase 2 Award at 12 (emphasis added).

¹⁰ *Order*, App. A, § VII.C.1-3.

a “bifurcated” arbitration schedule to resolve these threshold issues here, including having NBCUniversal’s contract defenses heard as part of Phase 1.¹¹ Far from being “dilatory,” the record shows that NBCUniversal fully cooperated with PCI and the Arbitrator to complete the arbitration on an expedited basis under a schedule that PCI willingly accepted.¹²

Moreover, because PCI refused to disclose its peer deal with [REDACTED] prior to the arbitration, NBCUniversal had no reasonable option *other* than to file a final offer for the scope of Comparable Programming at issue (“Phase 1 Final Offer”), rather than a final offer in the form of a license agreement. The Arbitrator correctly found that NBCUniversal’s Phase 1 Final Offer was appropriate and authorized under the *Order*.¹³ NBCUniversal could not reasonably have been expected to submit a final offer in the form of an agreement to “match” a peer deal that PCI refused to let NBCUniversal see. By trying to force NBCUniversal into that untenable position, PCI – not NBCUniversal – caused undue delay and expense.

The Arbitrator also rejected PCI’s claims that the contract defenses asserted by NBCUniversal were “vexatious.” He instead found that the defenses presented “close” and “difficult” questions.¹⁴ There was simply no “persuasive reason to conclude that NBCU and/or

¹¹ Letter from Jean V. MacHarg, Patton Boggs LLP, to Henry J. Silberberg, Arbitrator, at 3 n.3 (Apr. 2, 2012) (Vol. I, Tab 38 of Additional Record Items Before the Arbitrator); MacHarg Decl. ¶ 69.

¹² Phase 1 Dec’n at 4; *see also* Phase 2 Award at 12 (finding that “[t]here were no improper multiplicity of proceedings”).

¹³ Phase 1 Dec’n at 3; Phase 2 Award at 4.

¹⁴ Phase 1 Dec’n at 8. As shown in NBCUniversal’s Petition, the Arbitrator applied the wrong standard and erred by failing to decide these questions essentially on ripeness grounds. NBCUniversal Pet. at 17-24.

its counsel pursued any of these matters or engaged in any other action other than in good faith.”¹⁵

PCI continues to press the same baseless claims from its voluminous fee petitions on appeal here, while focusing in particular on a handful of additional arguments. None of these has any merit either.

First, PCI tries to spin the Arbitrator’s complete rejection of its fee petitions by asserting that he only found NBCUniversal’s attorneys acted “ethically” – and did not say that NBCUniversal acted “reasonably” during the arbitration.¹⁶ That is plainly not true. In the final award, the Arbitrator specifically rejected the majority of PCI’s numerous claims that NBCUniversal’s conduct was unreasonable and then made clear that, to the extent that he did not comment specifically on “all of the many alleged acts of *unreasonable* conduct upon which PCI relies, it should suffice to say” that none of them was meritorious.¹⁷

Second, PCI wrongly accuses NBCUniversal of “violat[ing] the non-disclosure obligation governing [its] discussions even before arbitration was triggered, by attempting to interfere with the peer deal through a third party partner.”¹⁸ As a threshold matter, this alleged conduct did not occur “during the course” of the arbitration and is thus outside the scope of any cost shifting

¹⁵ Phase 2 Award at 12.

¹⁶ PCI Partial Appeal (“PCI Partial App.”) at 7.

¹⁷ Phase 2 Award at 11-12 (emphasis added). He further found that, besides acting “ethically,” NBCUniversal’s counsel acted “professionally” and cooperated with PCI’s counsel throughout the proceedings. *Id.*

¹⁸ PCI Partial App. at 6.

authorized under the *Order*.¹⁹ And, in all events, the allegations of misconduct on NBCUniversal's part are not true. [REDACTED]

[REDACTED]²⁰ In contrast, PCI has used the NDA and CAPO, as well as threats of additional litigation, to shield basic information about its economic model from [REDACTED]

[REDACTED]²¹ If any party has misused confidentiality here, it is PCI, not NBCUniversal.

Third, PCI faults NBCUniversal for questioning whether PCI was a "Qualified OVD" within the meaning of the Benchmark Condition.²² This was another question of first impression under the *Order*. NBCUniversal had good faith grounds to assert – rather than waive – this authorized defense at the outset of the proceedings.²³ In its appeal brief, PCI cites to evidence that it contends was available to NBCUniversal and showed that PCI was a Qualified OVD.²⁴ But this again mischaracterizes the record. NBCUniversal asserted the defense based on PCI's [REDACTED]

¹⁹ *Order*, App. A, §§ VII.B.10, VIII.5; *see also* Phase 2 Award at 12 (correctly noting that a fee award can only be based on conduct during the arbitration proceeding).

²⁰ NBCUniversal rebutted these allegations before the arbitration and did so again when PCI later reasserted them as part of its fee petition. *See* NBCUniversal's Opposition to Claimant's Declaration In Support Of Request For Cost-Shifting (attached as Appendix A) (attaching initial Rebuttal Letter from David P. Murray, Willkie Farr & Gallagher LLP, to John M. Genga, Genga & Associates, P.C. (Oct. 25, 2011) as Exhibit A).

²¹ HT 248:2-20 (MacHarg) (threatening litigation).

²² PCI Partial App. at 6.

²³ *Order*, App. A, § IV.C.1.

²⁴ PCI Partial App. at 6.

[REDACTED] These representations were made in

[REDACTED]

[REDACTED]²⁵ After NBCUniversal filed its opening brief asserting the Qualified OVD defense based on this evidence, and only *three* days before the Phase 1 hearing, PCI produced written declarations from its principals [REDACTED]

[REDACTED].²⁶ Based on that additional information (among other things), NBCUniversal did not pursue the defense.²⁷ As the Arbitrator correctly found, nothing about NBCUniversal's conduct was "unreasonable."²⁸

²⁵ See Peer Deal, Ex. 3 at Ex. F-2 (describing how PCI [REDACTED]

Ex. 7 (PCI000034)

Ex. 10 (PCI000129)

²⁶ Smith Decl. ¶¶ 2, 10-11; Peyer Decl. ¶¶ 3-7.

²⁷ Phase 1 Dec'n at 5 (noting change in emphasis). Numerous factual uncertainties remain [REDACTED] See, e.g., HT 295:16-18, 299:15-19, 301:1-3, 308:2-4 (Smith); HT 397:3-7 (Peyer) ([REDACTED]); HT 301:11-17 (Smith); HT 384:14-18, 386:13-20, 392:9-20 (Peyer) ([REDACTED]).

²⁸ Phase 2 Award at 12. In its appeal brief, PCI persists in mischaracterizing how this issue was handled during the arbitration. As the record clearly shows, the Phase 1 hearing focused on the Peer Deal (including [REDACTED]); the nature of PCI's business model; and whether the [REDACTED] PCI's business model (which the Arbitrator found to be [REDACTED]) implicated certain [REDACTED] NBCUniversal Phase 1 Clos. Br. at 8-26 (cataloging hearing testimony on these points). NBCUniversal's post-hearing brief focused on these same issues. *Id.* NBCUniversal spent no time challenging whether PCI was a Qualified OVD or whether it had a license agreement with [REDACTED] Moreover, NBCUniversal's pursuit of these other issues helped narrow the parties' dispute and resulted in significant changes to PCI's Phase 2 Final Offer.

Fourth, PCI asserts that NBCUniversal's Phase 2 Final Offer "outright flouted the Arbitrator's Phase [1] conclusion that Project Concord is entitled to current TV titles and current movie titles."²⁹ This is another specious argument. The provision of some of this content to PCI implicates numerous other NBCUniversal license agreements, which is the very basis of NBCUniversal's contract defenses. Although the parties agreed to address the contract defenses during Phase 1 of the arbitration, the Arbitrator read the *Order* to defer any ruling on them until Phase 2.³⁰ NBCUniversal submitted a Phase 2 Final Offer that was [REDACTED] the Peer Deal, which gives [REDACTED] [REDACTED] [REDACTED] During the Phase 2 hearing, NBCUniversal maintained that it should have the same [REDACTED] [REDACTED] for PCI that would not constitute a breach of NBCUniversal's contractual obligations to other licensees.³¹ Rather than "flouting" any relevant ruling by the Arbitrator, NBCUniversal was *waiting* for him to rule on these issues as part of the Phase 2 proceedings. Further, during the Phase 2 hearing, NBCUniversal explained that if it retained [REDACTED] [REDACTED] [REDACTED] consistent with the rights of other NBCUniversal licensees, the Arbitrator would not have to rule on NBCUniversal's contract defenses.³² Conversely, NBCUniversal explained that, if PCI's Final Offer were chosen, the Arbitrator would need to rule on the contract defenses

²⁹ PCI Partial App. at 7.

³⁰ Phase 1 Dec'n at 4. In its petition for *de novo* review, NBCUniversal has sought clarification of this procedural issue by the Commission. NBCUniversal Pet. at 42-44.

³¹ Phase 2 Award at 5 (describing NBCUniversal's Phase 2 Final Offer); NBCUniversal Phase 2 Op. Br. at 2-3 (same); Wund. Sec. Decl. ¶¶ 7a, 10-11 (same).

³² HT 606:16-607-17 (Murray) ("But if NBCU's final offer is chosen, [REDACTED] [REDACTED], there is no need for a ruling on the contract defense issue.").

because PCI has demanded all current film and television programming, including content that is restricted under NBCUniversal's other license agreements from [REDACTED] like PCI.³³ In other words, [REDACTED] NBCUniversal would have [REDACTED] of new content provided to PCI. Far from being "unreasonable," the Arbitrator specifically noted that NBCUniversal's "candid" assessment of the two final offers assisted his decision-making.³⁴

Finally, PCI makes the related claim that NBCUniversal continued "unreasonably" to assert its contract defenses during the arbitration,³⁵ forcing PCI to "retry" these issues during Phase 2. In fact, as shown, NBCUniversal simply followed the direction of the Arbitrator, who specifically deferred any ruling on the contract defenses until Phase 2.³⁶ As he correctly stated at the end of the Phase 2 hearing, PCI was not "forced to retry anything. There has been some minor supplementation of the record that was previously created in [P]hase 1 and was purposefully left undecided until [P]hase 2."³⁷ In his final award, the Arbitrator further held that

³³ *Id.* As PCI itself acknowledged during the arbitration: "If the Arbitrator were to decide that NBCU had established a Contractual Impediment Defense as to any particular contract to which NBCU is a party, then the result would be a hold back of that content, pursuant to which NBCU would be relieved of any contractual obligations to provide it to PCI." PCI Phase 2 Reb. Br. at 15; *see also* Letter from Jean V. MacHarg, Patton Boggs LLP, to Henry J. Silberberg, Arbitrator, at 4 (Mar. 21, 2012) (Vol. I, Tab 18 of Additional Record Items Before the Arbitrator) ("Respondent may raise the defense that it would breach another contract that it has with a third-party After deciding the merits of that defense . . . the Arbitrator decides which of the two Phase 2 final offers most closely approximates the 'economic equivalent of the price, terms and conditions the OVD paid for the Comparable Programming' (*minus any programming for which Respondent has established a Phase 2 defense.*)") (emphasis added).

³⁴ HT 1045:19-1048:11.

³⁵ PCI Partial App. at 7.

³⁶ Phase 1 Dec'n at 4.

³⁷ HT 1045:19-1048:11.

“the additional time devoted by both parties in Phase 2 in presenting further testimony relating to the Contractual Impediment Defense did not involve any unreasonable conduct, as PCI contends, and such testimony and related argument in fact were helpful in clarifying the underlying facts and assisting [the Arbitrator] in reaching the ruling set forth above in PCI’s favor.”³⁸

The arbitration record thus fully refutes PCI’s baseless attempts to characterize virtually every aspect of NBCUniversal’s conduct in the arbitration as “unreasonable.” The Commission should affirm the Arbitrator’s rejection of PCI’s fee petitions in their entirety.

III. PCI’S AFTER-THE-FACT ATTEMPT TO REWRITE THE STANDARD FOR FEE AWARDS IS IMPROPER AND UNWARRANTED.

Because NBCUniversal acted reasonably and in good faith throughout the arbitration, PCI resorts to arguing that a different standard for awarding costs and fees should be applied whenever a “start-up” OVD like PCI invokes arbitration under the Benchmark Condition.³⁹ This would improperly change the fee award standard from its intended purpose as a sanction for misconduct to a prevailing party provision. An agency may not rewrite a standard after-the-fact in an adjudication. And there is no reason for the Commission to revisit its prior policy decision.⁴⁰

³⁸ Phase 2 Award at 12.

³⁹ PCI Partial App. at 5.

⁴⁰ It is hornbook law that an agency may not adopt a new standard to assess penalties in an adjudication where the underlying regulation provides for a different standard. *See Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (an agency must provide advance notice of “the standards with which the agency expects parties to conform”); *Star Wireless, LLC v. FCC*, 522 F.3d 469, 473 (D.C. Cir. 2008) (an agency violates a party’s due process where it retroactively applies a new standard without giving adequate notice).

The cost-shifting standard adopted by the Commission comports with well-established American jurisprudence for sanctioning litigants that engage in unreasonable behavior.⁴¹ The Commission adopted the same cost-shifting standard in three prior arbitration frameworks dating back to 2004.⁴² It would be inappropriate (and unlawful) for the Commission to depart after-the-fact from this standard, as PCI proposes here, and instead penalize a party for asserting defenses expressly authorized under the *Order* to protect its rights and interests – and those of its other licensees – in highly valuable programming.⁴³

Furthermore, the Commission considered concerns about the costs of litigation for OVDs (and others) in the Comcast-NBCUniversal proceeding and specifically adopted baseball-style arbitration rules to provide claimants with a streamlined, efficient process for seeking access to

⁴¹ See, e.g., 28 U.S.C. § 1927 (allowing fee awards for costs incurred where a party “multiplies the proceedings in any case unreasonably and vexatiously”); *Cruz v. Savage*, 896 F.2d 626, 634 (1st Cir. 1990) (upholding fee award where a party unreasonably prolonged proceedings to a point “beyond which zeal [became] vexation”).

⁴² See *News Corporation, DirecTV Group, and Liberty Media Corporation*, 23 FCC Rcd 3265, App. B, § IV.B.6 (2008) (“*Liberty/DirecTV Order*”); *Adelphia Communications Corporation, Time Warner Cable Inc., and Comcast Corporation*, 21 FCC Rcd 8203, App. B, § B.3.g (2006) (“*Adelphia Order*”); *General Motors Corporation, Hughes Electronics Corporation, and News Corporation Ltd.*, 19 FCC Rcd 473, App. B, § 5 (2004) (“*News/Hughes Order*”). Like the Benchmark Condition, these arbitration conditions provide (or provided) access to video programming or carriage on MVPD systems for a wide range of claimants, including emerging distributors and networks. See, e.g., *Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, 22 FCC Rcd 17938, ¶ 24 (2007) (allowing an emerging network to pursue arbitration under the *Adelphia Order* program carriage arbitration condition).

⁴³ In the one instance that NBCUniversal is aware of where an arbitrator awarded litigation costs, the Media Bureau *overturned* the cost award because, as here, the record did not demonstrate any unreasonable conduct by the respondent. See *Fox Sports Net Ohio, LLC v. Massillon Cable TV, Inc.*, 25 FCC Rcd 16054, ¶ 15 (2010) (costs awarded because respondent did not participate in arbitration, but the dispute was not arbitrable under the condition in the first place and so the cost award was vacated) (application for review pending).

programming.⁴⁴ The Commission did not automatically relieve OVDs – start-ups or otherwise – of the costs and risks of invoking this remedy.⁴⁵ Indeed, given the unprecedented nature of the Benchmark Condition, and the potential implications that an OVD’s demands for programming under the remedy may have on other licensees’ rights and interests, it would have been unwarranted and unfair for the Commission to have further obligated NBCUniversal to bear both its own costs and the costs of OVDs that invoke arbitration, regardless of whether the OVD is a start-up or established company. There is thus no basis for PCI’s suggestion that start-up OVDs should essentially have a “free pass” to pursue claims under the Benchmark Condition.

As this case shows, moreover, even a start-up OVD can engage in unnecessary proceedings and incur costs that were avoidable. “New and emerging” company or not, PCI chose to engage in “scorched earth” litigation⁴⁶ with a large team of attorneys and consultants in a clear attempt [REDACTED]

⁴⁴ See Order ¶ 51 (“After considering the record in this proceeding, we have modified our arbitration procedures from past transactions in order to make them more effective and less costly.”).

⁴⁵ The Commission was also well aware that OVDs would likely be start-ups in many cases. See *id.* ¶¶ 78-86 (discussing emerging OVD industry and noting that, “[b]y all accounts, OVD services have just begun”).

⁴⁶ Among other things, PCI: (1) tried repeatedly to force NBCUniversal to tender a final offer in the form of an agreement without even seeing the Peer Deal (which PCI materially misrepresented); (2) served voluminous document requests (many with multiple subparts) that were patently overbroad and abusive; (3) lodged numerous baseless objections to NBCUniversal’s documentary evidence, which were denied or withdrawn; (4) raised numerous unfounded objections during oral testimony, which were denied or withdrawn; (5) engaged in ad hominem attacks on NBCUniversal’s fact and expert witnesses (including mocking one expert’s surname); and (6) needlessly yelled, pounded the table, and gestured at NBCUniversal’s counsel and witnesses during Phase 1 closing argument.

[REDACTED]⁴⁷ PCI could have avoided (or significantly narrowed) the arbitration in any number of ways, including by (1) disclosing its Peer Deal early on (instead, PCI misrepresented material terms of the agreement); (2) offering NBCUniversal the [REDACTED] retained under the Peer Deal⁴⁸ (instead, as the Arbitrator noted, [REDACTED] [REDACTED]); (3) working with NBCUniversal on a description of PCI's service and other mutually-agreeable steps to approach representative NBCUniversal licensees, in advance, in a good faith attempt [REDACTED]; (4) the provision of new film and television content to PCI (instead, PCI used the NDA and CAPO to shield its business model and threatened additional litigation against NBCUniversal if it disclosed any aspect of PCI's [REDACTED] to other NBCUniversal licensees);⁵⁰ or (5) offering NBCUniversal [REDACTED] that PCI

⁴⁷ PCI is plainly well-funded. See *Project Concord: Stealthy video start-up has raised 'several million' from Andy Marcuvitz, formerly at Matrix Partners*, Jan. 22, 2010, available at http://www.boston.com/business/technology/innoeco/2010/01/project_concord_stealthy_video.html. According to its fee petitions, PCI retained two law firms and at least six partners, seven associates, a senior legal assistant, three experts, and three consultants for the arbitration. (By comparison, NBCUniversal's team consists of two partners, three associates, one legal assistant, and two experts.)

⁴⁸ NBCUniversal Phase 1 Clos. Br. at 28-31 (discussing [REDACTED]).

49 Phase 1 Dec'n at 8 (The Arbitrator found that NBCUniversal [REDACTED]
[REDACTED] And, if authorized to do so, he would
"mandate that [REDACTED]").

⁵⁰ NBCUniversal Phase 2 Op. Br. at 20-22; HT 605:16-606:15 (Murray) (discussing how “PCI has refused to permit NBCUniversal to pursue [redacted] other licensees”).

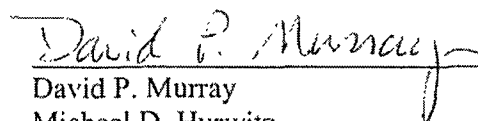
ultimately offered, at the very end of arbitration, in its Phase 2 Final Offer.⁵¹ Rather than pursuing any of these options, PCI chose its litigation course and has no basis to complain about the resulting costs.

IV. CONCLUSION

For all of these reasons, NBCUniversal respectfully requests that the Commission affirm the Arbitrator's denial of PCI's fee petitions in their entirety.

Dated: July 31, 2012

Respectfully submitted,



David P. Murray
Michael D. Hurwitz
Lindsay M. Addison
Mary Claire B. York

*Counsel for Respondent NBCUniversal
Media, LLC*

⁵¹ Further, a considerable amount of the Phase 2 hearing and testimony was necessary for NBCUniversal and the Arbitrator to understand the purpose and intent of certain provisions in PCI's Phase 2 Final Offer as compared to the Peer Deal. *See, e.g.*, HT 915:15-920:11, 1009:22-1011:20 (MacHarg/DeVitre) (discussing PCI's Phase 2 Final Offer); HT 926:17-950:7, 953:19-954:18, 966:11-978:19 (Murray/DeVitre) (same). Had PCI been more forthcoming in explaining the choices it made in its Phase 2 Final Offer, this additional hearing time and expense could also have been avoided.

VERIFICATION

I, David P. Murray, do hereby declare and state under penalty of perjury as follows:

1. I am a partner in the law firm of Willkie Farr & Gallagher LLP, and
2. I have read the foregoing Opposition to Project Concord, Inc.'s Partial Appeal ("Opposition"). To the best of my personal knowledge, information, and belief, the statements made in this Opposition, other than those of which official notice can be taken, are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. The Opposition is not interposed for any improper purpose.

July 31, 2012
July 31, 2012

David P. Murray
David P. Murray

CERTIFICATE OF SERVICE

I, Lindsay M. Addison, hereby certify that on July 31, 2012, I caused true and correct copies of the enclosed Opposition to Project Concord, Inc.'s Partial Appeal to be served by hand delivery to the following, except for those marked by (*), who were served by overnight delivery.

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**ENTIRE APPENDIX
REDACTED – FOR PUBLIC
INSPECTION**

APPENDIX A